PATTON BOGGS LLP
ATTORNEYS AT LAW

2550 M Street, NW
Washington, DC 20037-1350
202-457-6000

Facsimile 202-457-6315

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Benjamin L. Ginsberg
202-457-6405
bginsberg@pattonboggs.com

VIA COURIER

Tony Buckley, Esquire
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 4648

Dear Mr. Buckley:

Please accept for filing this revised Response in the above-captioned matter. We would appreciate the Office of General Counsel and the members of the Commission basing your deliberations on this Brief, which amends the document filed on September 22, 1999.

Thank you for your consideration.

Sincerely,

Benjamin L. Ginsberg
Counsel for Respondents

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
New York Republican Federal Committee and	)	MUR 4648
Michael Avella, as treasurer; William D. Powers;	)	
and Jeffrey T. Buley	)	

RESPONSE OF THE NEW YORK REPUBLICAN FEDERAL COMMITTEE, AND MICHAEL AVELLA, AS TREASURER; WILLIAM D. POWERS; AND JEFFREY T. BULEY TO THE GENERAL COUNSEL'S BRIEF

Respondents New York Republican Federal Campaign Committee ("the Party"), and Michael Avella, as treasurer; William D. Powers; and Jeffrey T. Buley, by and through the undersigned counsel, hereby respond to the Federal Election Commission's ("Commission") General Counsel's Brief filed in the above-captioned matter under review. A fair-minded review of the General Counsel's Brief and the transcripts of the two depositions that compose the entire investigation in this matter will reveal to the Commission a superficial investigation conducted at a laconic pace that cannot sustain a knowing and willful violation. Beyond the conclusory hype, Respondents respectfully request that the Commission recognize that the Brief and investigation into this matter warrants at most, a good-faith, non-punitive conciliation over the technical deficiencies in Respondents' reporting of 1994 and 1996 election expenditures.

I. INTRODUCTION

The General Counsel's recommendation to find probable cause is based on sweeping assertions that are not proven nor even substantiated in the General Counsel's Brief. Utterly lacking in that Brief is any specific, verifiable fact that supports the General Counsel's contention that Respondents knowingly and willfully engaged in acts designed to circumvent the Act. As will be discussed in the following sections, it is the General Counsel's burden to establish facts which demonstrate evidence of a knowing and willful violation sufficient to sustain a probable cause finding by the Commission; and not, as the General Counsel would have it, the Respondents'

burden to establish facts which demonstrate compliance with applicable provisions of the Act. To find otherwise would stand the presumption of innocence on its head and place on Respondents the burden of proving a negative. Respondents are confident that after reading the General Counsel's brief and the deposition transcripts, the Commission will not find evidence sufficient to sustain a probable cause finding that Respondents knowingly and willfully violated the provisions of the Act governing disbursement, recordation, and reporting of campaign expenditures.

The crux of the problem is the superficial nature of the investigation upon which the General Counsel's Brief rests. The General Counsel has "investigated" this matter for over two years. Yet the General Counsel apparently took only two depositions in that entire time period – those of the Party Chair and counsel. There was apparently no attempt to corroborate any of the Brief's conclusions by actually interviewing witnesses. No other depositions. Minimal written interrogatories. But plenty of sweeping conclusions.

And in just relying on the two depositions, the knowing and willful finding rests not on facts developed but on Respondents' inability to recall dates, times, names, places, and specific information pertaining to sums of money. A fair reading by Commissioners will show this slim reed is then used to create an inference that Respondents are being less than forthcoming and, therefore, must have something to hide. Respondents suggest that the Commissioners need only try to recall similar information from their own past, which may or may not have been relevant when it occurred over four years ago, to appreciate the impossible position in which Respondents are placed. "Suspicions" and "feelings" by the General Counsel's office do not a knowing and willful violation make; nor does the hollow "totality of the evidence" rubric cover up an investigation that, judging the brief, yields precious little "evidence".

Through no fault of their own, and because these proceedings have been allowed to drag on lackadaisically, Respondents now face the daunting task of having to refute unfair and unfounded inferences that exist specifically because the passage of time has quite naturally degraded individual memory. That the Commission should then deny Respondents a modest extension of time with which to undertake the serious and important effort of attempting to reconstruct events long ago

forgotten seems to be nothing less than a violation of Respondents right to a fair and just proceeding. It is Respondents' sincere hope that once the Commission has considered this response, it will agree that in this case, the Commission has not lived up to its own expectations of what a just proceeding should be and so will forthwith dismiss this cause of action against Respondents.

II. SUMMARY OF FACTS[1]

To the very best of their understanding of federal election law in 1994 and 1996, Respondents attempted to comply with the disbursement, recordation, and reporting requirements specified in sections 432(c)(5), (h)(1), 434(b)(5)(A), (6)(B)(i), and (6)(B)(v) of the Act. Indeed, immediately following the 1994 and 1996 elections in New York City, Respondents knowingly, willfully, and voluntarily reported the election finance information regarding disbursement of campaign funds which the General Counsel now attempts to portray as evidence of Respondents' circumvention of the Act. However, what the General Counsel completely ignores, and what the Commission must consider to arrive at a just resolution of this case, is the unique context in which the Respondents made their decisions during the 1994 election, and the degree to which the Commission's own actions during the post 1994 election cycle influenced Respondents to act as they did during the 1996 elections.

Beyond dispute is the fact that the New York Republican Party organized an extensive volunteer election day program during the 1994 and 1996 election cycles. The unprecedented mobilization of volunteer poll-watchers throughout New York City's five boroughs not only guaranteed fair elections, but the massive participation by the largely poor, mostly minority, previously disenfranchised city residents created issues never before encountered by the Party. The Party relied on its grass roots organization to overcome logistical problems and facilitate

[1] Respondents provide this summary of facts for the purpose of clarifying certain inaccuracies in the brief submitted in support of the recommendation to find probable cause. ("General Counsel's Brief"). However, Respondents reaffirm the substance of the factual recitation provided in the "Background" section of their Response to the Commission's factual and legal analysis to support a reason to believe, which should be referenced for its comprehensive documentation of facts relevant to this action.

participation by the unprecedented number of city residents eager to monitor the election process. A key component of the grass roots support, authorized under state law, was distribution of funds to compensate volunteers for the cost of incidental election day expenses, such as reimbursement for food, transportation, or day care. It was in this context that Respondents grappled with how to properly disburse authorized financial support and correctly report the numerous small expenditures that resulted from the Party's commitment to fair elections in New York City.

When the allegations enumerated in the General Counsel's brief are put in proper context, Respondents are confident that the Commission will conclude that Respondents did not knowingly and/or willfully violate any provision of the Act. Additionally, Respondents contend that the Commission will conclude that the General Counsel has not produced the specific, credible evidence necessary to enable the Commission to find probable cause that Respondents knowingly and willfully violated federal law.

III. SUMMARY OF LAW

Pursuant to 2 U.S.C. §432(h)(1), no disbursement may be made by a political committee in any form other than by check drawn on the committee's account at its designated campaign depository, except for disbursements of $100 of less from a petty cash fund which may be established under the provisions of 2 U.S.C. §432(h)(2). Pursuant to 2 U.S.C. §432(c)(5), a committee is required to keep an account of the name and address of every person to whom it makes a disbursement, along with the date, amount, and purpose of the disbursement, including a receipt, invoice, or canceled check for each disbursement in excess of $200.

Under 2 U.S.C. §434(b)(5)(A), a political committee is required to report the name and address of each person to whom an expenditure in excess of $200 is made by that committee to meet an operating expense, together with the date, amount, and purpose of such operating expenditure. Additionally, 2 U.S.C. §434(b)(6)(B)(i) requires that a political committee report the name and address of any political committee which has received a contribution from the reporting committee, together with the date and the amount of the contribution. A political committee must

also report the name and address of a person who has received any disbursement not otherwise reportable under 2 U.S.C. §434(b)(5) in excess of $200, together with the date, amount, and purpose of the disbursement.

Under the enforcement provision of the Act, Congress established a penalty structure which differentiates between simple violations and those violations found to be knowing and willful. 2 U.S.C. §437g. In considering whether a violation of the Act is knowing and willful, and therefore sufficient to sustain the enhanced penalties provided by the Act, the United States District Court of Appeal, District of Columbia Circuit noted that to find a violation "'willful,' [the] violation must necessarily connote 'defiance or such reckless disregard of the consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the [Occupational Safety and Health Act].' To hold otherwise would fail to distinguish between a 'serious' offense and a 'willful' one and would 'disrupt the gradations of penalties' established by Congress." *American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) v. Federal Election Commission*, 628 F.2d 97, 101; 202 U.S. App. D.C. 97, *citing Frank Irey Jr., Inc. v. Occupational Safety and Health Review Commission*, 519 F.2d 1200, 1207 (1975). The *AFL-CIO* decision also noted that "[i]t is clear that uncertainty as to the meaning of the law can be considered in assessing the element of willfulness in violation of the law." 628 F.2d at 101, *citing James v. United States*, 366 U.S. 213 (parallel citations omitted) *and United States v. Garber*, 607 F.2d 92 (5th Cir. 1979).

"Knowing and willful" actions are those that are "taken with full knowledge of all the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H3778 (daily ed. May 3, 1976). The knowing and willful standard requires knowledge that one is violating the law. *FEC v. Dramesi for Congress Comm*, 640 F.Supp 985 (D.N.J. 1986). A knowing and willful violation may be established by "proof that the defendant acted deliberately and with knowledge that the representation was false." *U.S. v. Hopkins*, 916 F.2d 207, 214-215 (5th Cir 1990). A knowing and willful violation may be inferred "from the defendants' elaborate scheme for disguising [their actions and their] deliberate convey[ance of] information they knew to be false to the Federal Election Commission." *Id.* "It has long been recognized that 'efforts at concealment [may] be reasonably

explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214, *citing Ingram v. United States*, 360 U.S. 672, 679 (1959).

IV. ANALYSIS

The charges against Respondent Party are patently multiplicious. It is clear that the same conduct serves as the basis for the alleged violations of 2 U.S.C. §§432(c)(5), 432(h)(1), 434(b)(5)(A), 434(b)(6)(B)(i), and 434(b)(6)(B)(v). No matter how many different theories the Commission employs to allege violation of the Act, in fact, the gravamen of each alleged violation against the Party is the 1994 and 1996 lump-sum disbursement of Party funds by Mr. Buley to Mr. Powers, and Mr. Powers' subsequent disbursement of those funds in smaller increments to field operatives of the New York City Republican Party. Based on that conduct, the Party is alleged to have committed disbursement, recordation, and reporting violations of the Act. That each violation is alleged to have been committed knowingly and willfully adds nothing to the essence of the many charges; but does serve to artificially hype the seriousness of the multiple charges by implying a pattern of intentional misconduct.

Similarly, Respondents Powers and Buley are both alleged to have violated 2 U.S.C. §432(h)(1) based on their disbursement of Party money first by Mr. Buley to Mr. Powers, and then by Mr. Powers to the field operatives. The General Counsel's imprecise use of *mens rea* language makes it difficult to determine whether Respondents Powers and Buley are being charged with simple violation of the Act (*see*, General Counsel Brief, pages 1-2, "the Commission found reason to believe that [both men] *violated* 2 U.S.C. § 432(h)(1)" (emphasis added)), or whether both men are charged with knowing and willful violation of the Act (*see*, General Counsel Brief, page 2, "the totality of the evidence shows that in both 1994 and 1996, Respondents' violations of the law were knowing and willful."). Because the General Counsel does not demonstrate evidence sufficient to sustain a knowing and willful violation in either instance, the imprecision does not handicap Respondents Buley and Powers since the only real issue for the Commission is whether a minor technical violation of the Act occurred unbeknownst to Respondents.

Notwithstanding the multiplicious nature of the charges facing Respondents, the remainder of this analysis evaluates each allegation against Respondents Powers and Buley to demonstrate the General Counsel's failure to prove that there is probable cause to believe these two Respondents knowingly and willfully violated the provisions of the Act. If the evidence does not sustain a knowing and willful violation by Respondents Powers and Buley, there is, by definition, insufficient evidence to find knowing and willful violations on the part of Respondent Party, whose culpability or lack thereof is inextricably bound to the conduct of Mr. Powers and Mr. Buley.

A. Respondent Jeffrey T. Buley Reasonably Believed that 2 U.S.C. §432(h)(1),(2) Prohibited Disbursement of Party Funds to Individual Poll Watchers in Excess of $100 and so by Facilitating Disbursements Through Mr. Powers that Did Not Exceed Amounts Greater Than $100 per Poll Watcher, Mr. Buley Reasonably Believed He Was Complying with Federal Election Law and so Did Not Knowingly and/or Willfully Violate the Act During the 1994 or 1996 Elections

The General Counsel's Brief chooses to ignore sworn, uncontroverted evidence demonstrating there were no knowing and willful violations. There is no dispute that Respondent Buley was personally aware of the poll watcher program as he had personally trained thousands of the volunteers between 1993 and 1994. Deposition of Jeffrey T. Buley ("Buley Deposition") at 11. Nor is it contested that both Mr. Buley and the Party were cognizant of the 2 U.S.C. § 432(h)(1),(2) prohibition against cash disbursements to any individual poll watcher in excess of $100. *Id.*, at 13. Mr. Buley has consistently testified that there was an affirmative decision by the Party that a limit on cash disbursement of $100 to individual volunteers was absolutely required by federal law. *Id.* at 13; *see also* Buley Aff. ¶17. Yet, the General Counsel's Brief at 11 attempts to make much of the fact "the true recipients" of the funds were not on the public record. Of course, the Brief never addresses its own narrative of the law, General Counsel's Brief 2-3, acknowledging that disbursements of less than $100 are not required to be reported publicly.

It is also uncontested fact that Mr. Buley properly designated the allocation account as the proper source of funds to support the poll watcher program in 1994 because the Party, though primarily focused on the gubernatorial race, was nevertheless involved with employment of poll

watchers for federal races as well. Buley Deposition, page 4. Having experimented with the poll watcher program in the 1993 mayoral election, Mr. Buley was confident that his use of poll watchers in the 1994 election cycle complied with both state and federal law. *Id.*

Mr. Buley acknowledges that prior to the 1994 election, he researched the issue regarding the appropriate method to get Party funds to the thousands of poll watchers. Buley Aff. ¶13. Mr. Buley notes that his research provided no clear-cut answer and that he made the decision that the best method for getting the funds to the volunteers would be to have Party checks disbursed to a limited number of individuals and that he would then collect the cash and pass it along to Mr. Powers. Mr. Powers then effected distribution to party officials who then distributed the funds to the volunteer poll watchers. *Id.* Responding to a question about what he did in 1994 with $50,000 in Party funds, Respondent Buley stated that, after travelling to New York City, he presented the money to Respondent Powers and that, "I told [Mr. Powers] that this is the money for the poll watchers to reimburse them for their expenses for working on election day and that no one volunteer in the field on election day was to receive more than $99." Buley Deposition, page 28. When asked by Commission counsel what he expected Mr. Powers to do with the money, Mr. Buley replied, "I would expect him to use intermediaries of the Party to make sure the money got to the volunteers in the field." *Id.* at 29. Buley noted that he did not believe it was practical for Respondent Powers to personally deliver the money to each and every poll watcher and that the use of intermediaries was the only logical solution. *Id.* The General Counsel's Brief ignores these facts.

After successful employment of poll watchers in the 1994 election, Mr. Buley candidly admits that he mistakenly instructed the Party accountants to annotate "Election Day Activities" as the purpose for disbursements to the selected individuals who initially cashed Party checks prior to turning the money over for eventual disbursement to the poll watchers. *Id.* at 34. Mr. Buley testified that it was a letter from the Commission's Reports Analysis Division (RAD) that alerted him of the mistake in annotating the proper purpose. *Id.* Contrary to the General Counsel's Brief's assertions that this was somehow a "deliberate falsification tactic" constituting a knowing and willful violation, it is unclear what ultimately was hidden. While not technically a correct description, the

Party did report the total amounts involved and did report them as "Election Day Activities." This may be incorrect reporting. But the General Counsel's Brief does not – as it cannot – say how this reporting hides the disbursement of the total amount involved. Nor does the Brief bother to explain why the Party would care if these small disbursements were reported. In other words, technical reporting may have been overlooked, but if the total amount was put on the public record as "Election Day Activities," the important paper trail, General Counsel's Brief at 13, exists.

Critical to understanding why Mr. Buley, Mr. Powers, and the Party repeated the same procedures in implementing the 1996 election poll watcher program is what occurred when Mr. Buley and the RAD discussed the reporting deficiency for the 1994 election. According to Mr. Buley, he contacted the RAD in order to remedy the reporting mistake. In his discussions with the RAD, Mr. Buley explained how the funds in question had been expended in support of the volunteer poll watchers and that the funds were originally obtained by the listed individuals. *Id.* at 35. Mr. Buley and the RAD contact determined that an appropriate purpose annotation for the report would be "GOTV – Travel Expense Reimbursement and Catering Costs." *Id.* At no time did the individual working in the Commission's division responsible for monitoring compliance with federal election finance reporting inform Mr. Buley that disbursing Party funds to poll watchers through intermediaries was in any form or fashion improper. Thus, according to Mr. Buley's sworn testimony – testimony that is not contradicted by any evidence in the General Counsel's brief – an employee of the Commission which now brings this cause of action against Respondents failed to inform Respondent Buley that the method of disbursing $99 payments to poll watchers violated the law. *Id.* at 33. Relying on the information from the Commission's RAD, Mr. Buley submitted an amended election report and, to the best of his knowledge, brought the Party into full compliance with federal election law. The Office of the General Counsel did not enter an objection to the Party's procedures for the 1994 elections.

What should quite clearly come as no surprise to the Commission is that Respondents Party, Buley, and Powers effected the exact same disbursement plan for the poll watchers who volunteered to work the 1996 election. *Id.* Although only $22,500 was disbursed during this election cycle, and

even though the individuals who initially received the Party funds from the bank received lesser amounts than what had been disbursed in 1994, Mr. Buley "implemented virtually the same election day program as in 1994." *Id.*

Wholly unconcerned about the propriety of the disbursement program because he had received no indication from the Commission's reporting watchdogs that the program was illegal, Mr. Buley allowed the 1996 election report to be submitted without checking carefully that the report was in compliance with Commission rules. Once again, inadvertence – not some unproven sinister motive assumed by the Office of the General Counsel – caused the Party to submit records of the 1996 poll watcher disbursements with the improper purpose annotated as "Election Day Activities." Buley Aff. ¶21. Once again the purpose statement was amended and a revised filing submitted to the Commission.

B. Respondent William D. Powers Reasonably Believed that 2 U.S.C. §432(h)(1),(2) Prohibited Disbursement of Party Funds to Individual Poll Watchers in Excess of $100 and so by Facilitating Disbursements Through Party Organizers that Did Not Exceed Amounts Greater Than $100 per Poll Watcher, Mr. Powers Reasonably Believed He Was Complying with Federal Election Law and so Did Not Knowingly and/or Willfully Violate the Act During the 1994 or 1996 Elections

Respondent Powers' role in distributing Party funds to poll watchers is undisputed. All parties agree that Mr. Powers received approximately $50,000 from Mr. Buley shortly before the 1994 election and that he then distributed sums of money to party organizers who ultimately effected disbursement to the volunteer poll watchers. Deposition of William D. Powers ("Powers Deposition"), at 15. All parties agree that Mr. Powers had no other role in the distribution of Party funds during the 1994 election. Similarly, Mr. Powers received approximately $22,500 from Mr. Buley shortly before the 1996 election and then distributed sums of money to party organizers who ultimately effected disbursement to the volunteer poll watchers. *Id.* at 24.

All parties agree that Mr. Powers had no role in preparing election reports and that he obtained all information regarding compliance with election laws from his legal staff, which included Mr. Buley. What appears to be undisputed is that Mr. Powers directed the establishment of a poll

watcher program, that he was familiar with the training of the volunteers, and that he disbursed through intermediaries funds sufficient to pay poll watchers for their services, not to exceed $100 per individual. The General Counsel's Brief conveniently ignores this.

C. Why Neither Respondent Buley nor Respondent Powers Knowingly and/or Willfully Violated the Act in 1994 or 1996

Based on their experience in 1993, Respondents entered the 1994 election cycle with a plan to monitor election districts and polling places in New York City which they were sure complied with both state and federal law. Besides a minor reporting discrepancy pertaining to the description of the poll watcher disbursements, the Commission's Reports Analysis Division did not identify to Respondent Buley any violation of federal election law resulting from the employment of thousands of poll watchers in the 1994 election. This fact is not contested by any party to this action and it is critical to understanding why Respondents replicated the poll watcher program for the 1996 election cycle. The Respondents persisted in a course of action they fully believed to be in compliance with federal law because the federal agency chartered to ensure election law compliance effectively ratified the poll watcher program in giving the 1994 iteration a clean bill of health after the reporting amendment.

Moreover, the basic funding assumption upon which the poll watcher program was predicated – the law prohibits cash disbursements in excess of $100 to any poll watcher – was correctly and consistently identified by Respondents as a guiding tenet of the program. No matter how badly the General Counsel wants to infer that individuals at the end of the distribution chain received cash disbursements in excess of $100, the irrefutable facts are that Respondents provided strict guidance that all poll watcher disbursements were to be capped at the legal threshold. That evidence must be measured against the General Counsel's unsupported allegation that, because Respondents can not document exactly where the disbursements went, they must have been

improperly made. If it had wanted to prove this case (rather than merely make unsubstantiated conclusions), the General Counsel's investigation would have found individuals who received more than $100. Of course, the "investigation" fails to do this, and so fails to meet its burden.

The General Counsel has confused the burden of proof in this matter and has attempted to shift both the burden of production and the burden of persuasion to Respondents. The General Counsel asserts, "[d]espite the Committee's assertions, it cannot substantiate that the $50,000 in 1994 and the $22,500 in 1996 were used for a poll watcher program." Respondents submit that this statement not only demonstrates the incorrect and unfair burden shifting by the General Counsel, it also ignores the uncontested evidence before the Commission. There is no evidence that contradicts the reported fact that in 1994 and 1996, Party funds were withdrawn by a small number of individuals who then turned the money over to Mr. Buley. There is similarly uncontested sworn testimony that Mr. Buley turned the money over to Mr. Powers with the explicit instructions necessary to ensure that no poll watcher received a disbursement of more than $100. There is no evidence in the record that rebuts the sworn testimony of Mr. Powers that he distributed Party funds to party officials in New York City with instructions for the proper disbursement of funds to the volunteer poll watchers. Finally, there is not one iota of evidence in the record that even one dollar of Party funds was improperly utilized. The General Counsel's Office seems to confuse its *desire* for evidence to corroborate its theory of the case with the irrefutable evidence presented in the form of sworn testimony and demonstrated course of dealing that directly contradicts the recommendation for probable cause.

In 1994, Respondents interpreted the Act's provisions regarding Party disbursements to mean that the ultimate consumer of Party disbursements, the thousands of volunteer poll watchers who were mobilized to monitor New York City polling places, could not receive a cash disbursement exceeding the limits imposed by 2 U.S.C. §432(h)(1),(2). Respondents interpreted those provisions as a matter of first impression, for there did not appear to be any analogue to the mass use of election monitors by a political party and the use of Party funds to pay those volunteers, as authorized by state law. The *AFL-CIO* court showed great solicitude for the AFL-CIO who, like

Respondents, had to interpret an ambiguous provision of the Act in instituting the organization's program. The court noted:

> We think it is obvious that in construction of any penal statute of which willfulness is an element, it is possible for the meaning of the statute to be clear to the mind of a trained judge, and still be less than clear enough to support a finding of willful violation. This is certainly so where, as here, the question whether the conduct of the AFL-CIO was unlawful, was hitherto untested by any sort of tribunal.

628 F.2d at 101. Relying on common sense, Respondents could not imagine that the Act actually contemplated explicit documentation of nominal expenditures made to thousands of volunteers scattered across a city of nearly 9 million people. Moreover, without using intermediaries to channel the disbursements to the poll watchers, there would be no practical way to make the thousands of disbursements which state and federal law seemed to embrace. The General Counsel finds that disbursements in excess of $100 cash to intermediaries is a violation of 2 U.S.C. §432(h)(1) and that Respondents could have and should have issued checks to the intermediaries in order to preserve an audit trail. Based on the Respondents good-faith premise that the intermediaries only facilitated disbursement of nominal sums to poll watchers – as opposed to being the actual recipients of disbursements – Respondents were acting within the spirit, if not the strict letter, of the Act.

Respondents' initial interpretation of the disbursement requirements should foreclose any finding by the Commission that Respondents knowingly and willfully violated the Act. Respondents' good-faith interpretation of an ambiguous and untenable code provision, absent any evidence to the contrary, should shield Respondents from a finding of an intentional violation, and instead dictate a finding by the Commission that any violation was of a purely technical nature. The rationale articulated by the Court of Appeals for the District of Columbia in the *AFL-CIO* decision is a perfectly apt rationale for dispensing with any notion of a "knowing and willful" violation in this case. The *AFL-CIO* opinion noted:

> In our case there is not only no finding but also no evidence of such "defiance" or "knowing, conscious, and deliberate flaunting" of the Act. In fact, every indication is that the AFL-CIO considered itself to be in compliance with the Act. It learned nothing to the contrary from the GAO

upon the occasion of the latter's audit. The fact that the AFL-CIO was routinely reporting the inter-fund transfers to the very agency charged with enforcement of the Act is persuasive evidence of a lack of intent to violate the Act's prohibitions.

628 F.2d at 101. The record before the Commission is devoid of any evidence indicating Respondents' defiance, or a knowing, conscious, and deliberate flaunting of the Act. Moreover, there is irrefutable evidence that the Respondents considered themselves to be in compliance with the Act. Clearly, the Respondents learned nothing to the contrary as a result of their dealings with the Commission's Reports Analysis Division in the post 1994 election cycle. Indeed, the fact that the Respondent Party volunteered the information to the Commission in its publicly-filed reports is persuasive evidence of the Respondents' lack of intent to violate the Act.

"Knowing and willful" actions are those "taken with full knowledge of all the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H3778 (daily ed. May 3, 1976). The knowing and willful standard requires knowledge that one is violating the law. *FEC v Dramesi for Congress Comm*, 640 F.Supp 985 (D.N.J. 1986). There is no evidence before the commission that Respondents knew they were violating the law. A knowing and willful violation may be established by "proof that the defendant acted deliberately and with knowledge that the representation was false." *U.S. v Hopkins*, 916 F.2d 207, 214-215 (5th Cir 1990). A knowing and willful violation may be inferred "from the defendants' elaborate scheme for disguising [their actions and their] deliberate convey[ance of] information they knew to be false to the Federal Election Commission." These cases are inapposite based on the complete absence of any evidence that Respondents engaged in a scheme to violate any law. There is simply no evidence before the Commission that supports the General Counsel's inference of a scheme or plan to subvert the Act. Moreover, no information submitted to the Commission was false. Indeed, Respondents promptly and unambiguously reported the large disbursements to the individuals who then gave the money to Mr. Buley. Based on their belief that all Party funds were ultimately being disbursed in the form of nominal cash payments to volunteers, Respondents had no obligation to report any additional information regarding the Party funds.

D. Because the Actions of Respondents Buley and Powers Were Not Knowing and Willful Violations of the Act, Respondent Party Did Not Knowingly and Willfully Violate the Act in 1994 or 1996

The Party's actions during both the 1994 and 1996 elections must be measured against the presumptions which adhered to the conduct of Respondents Buley and Powers. Because Buley and Powers had a good-faith basis to believe they were not violating the rules governing disbursements, the same good-faith belief adheres to Respondent Party. Thus, it is not possible to find a knowing and willful violation of the disbursement provisions on Respondent Party's part. Similarly, because Respondent Party had no basis to know improper disbursements were being made, it can not be found to have knowingly and willfully violated the provisions governing reporting of Party expenditures. Finally, although the Party was responsible under the provisions of 2 U.S.C. §432(c)(5) for recording all disbursements, including those made from petty cash, it is not reasonable for the Commission to find a knowing and willful violation of that provision. The practical impossibility of recording relevant information pertaining to thousands of unknown poll watchers makes the application of 2 U.S.C. §432(c)(5) a nullity in situations, like this, where practicalities and common sense favor decentralized control of disbursements. This is particularly true in a situation such as this one where the full amount of "Election Day Activities" was reported. Therefore, Respondents respectfully submit that Respondent Party should not be found to have committed any knowing and willful violation of the Act and that, if a violation did occur, Party's culpability pertains to that of the unwitting participant in a technical violation

V. CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Commission find no knowing and willful violation of the Act and recognize that the Brief and investigation into this

matter warrants at most, a good-faith, non-punitive conciliation over the technical deficiencies in Respondent Party's reporting of 1994 and 1996 election expenditures.

Respectfully submitted,

Benjamin L. Ginsberg
Michael E. Klein
Counsel for Respondents
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037

(202) 457-6000